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No. 91-2004

In The

Supreme Court of the United States

October Term, 1992

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation,

Respondent,

vs.

CITY OF FENTON, a Michigan Municipal Corporation,

Petitioner.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court properly granted and the Michigan appellate and Supreme Court properly affirmed respondent's motion for summary disposition in ruling that as a matter of law the City of Fenton's local train speed ordinance is preempted by the provisions of the Federal Railroad Safety Act, 45 U.S.C.A § 421 *et seq.*

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

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On Petition for a Writ of Certiorari to the Michigan Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Grand Trunk Western Railroad respectfully asks this Court to deny the petition for a writ of certiorari seeking review of the Michigan Supreme Court's decision in this case.

STATEMENT OF THE CASE

The Grand Trunk Western Railroad Company (GTW),

operates a regional railroad through four states and with connections to various points in Canada. It is a common carrier and a rail carrier engaged in significant interstate commerce and is a "railroad" within the meaning of the Federal Railroad Safety Act, 45 U.S.C.A .§ 421 *et seq.*

The City of Fenton (Fenton) is a Michigan municipal corporation. Fenton is bisected by a single mainline track of the GTW which intersects seven highway crossings at grade spread throughout the city. Both GTW and Fenton are in complete compliance with all Michigan Department of Transportation orders concerning crossing protection at each and every Fenton grade crossing.

In the fall of 1986 the GTW operated approximately 24 regular trains a day through Fenton. The railroad's maximum speed for most classes of freight train was 50 miles per hour. The GTW maintains these tracks in a condition which conforms to the standards applicable to train operations at the cited speed. This speed is in turn reported to the Federal Railroad Administration (FRA) and published by way of railroad timetables. The FRA regulates, inspects and confirms track conditions within the framework of standards enunciated in the pertinent code of the Federal Regulations, 49 C.F.R. 213 *et seq.* GTW is in compliance with the specific maximum speed laws contained in 49 C.F.R. 213.9.

The relevant issue before this Court is whether Fenton has the authority to enact and enforce an ordinance that is contrary to 45 U.S.C.A. § 421 *et seq.* It is not, as Fenton contends, an issue of focusing on prior accidents to justify the purpose of the ordinance.

To address a perceived accident problem, the part-time City Council of Fenton, without the assistance of Michigan Department of Transportation or expert advice, enacted Ordinance Number 459,

effective October 28, 1986 to regulate speed of trains within the Fenton city limits to 25 mph.

THE CITY OF FENTON ORDAINS

1. That the maximum speed limit of railroad trains operating in the City of Fenton is hereby limited to 25 mph.

2. Any violation of the provisions of this ordinance shall be considered a misdemeanor punishable by up to 90 days in jail and/or a fine of not to exceed $500.00.

3. The person in immediate charge and control of a train and/or any railroad company or corporation, owning or operating any railroad in violation of the provisions of this ordinance may be charged with the violation of the provisions of this ordinance.

4. This ordinance shall be effective fifteen (15) days after enactment and after publication required by law.

The GTW first asked the city to retract its law and then filed suit to enjoin it based on the preemptive effect of the Federal Railroad Safety Act of 1970, 45 U.S.C.A. § 421 *et seq.*, specifically at § 434. This Act comprehensively and explicitly regulated all pertinent areas of railroad safety in controversy here. The railroad submitted as a matter of law that municipalities have no remaining power or authority to regulate train speed within their borders, regardless of conditions, and what remaining authority was allowed is vested solely and non-delegably with the state.

GTW filed the action seeking equitable relief on or about

February 26, 1987. A court clerical error had resulted in the case being technically dismissed. Petitioner would not agree to a stipulated reinstatement and asserted GTW must file a new action. GTW did so in the United States District Court, E.D., which case was ultimately assigned to Judge Newblatt as Case No. 89-CV-40040-FL.

Judge Newblatt acted to take jurisdiction of the matter and issued a temporary restraining order precluding Fenton, from enforcing the disputed ordinance. He also ordered the parties to seek reinstatement of the well developed state action. On uncontested motion, the Circuit Court judge reinstated the original action and heard the arguments. On March 13, 1989, the judge issued his well researched opinion and granted GTW's motion for summary disposition finding as a matter of law. 45 U.S.C.A. § 421 *et seq*. preempted the city from enacting enforceable local train speed laws (*see* Petitioner's Appendix).

The federal court then dismissed the concurrent action *sua sponte*.

Fenton appealed the decision to the Michigan Court of Appeals. Arguments were held on April 18, 1990 and the opinion denying Fenton's appeal and affirming the trial court was issued June 5, 1990 (*see* Petitioner's Appendix).

Fenton then sought and was granted certiorari by the Michigan Supreme Court. After review of briefs and arguments a unanimous Michigan Supreme Court affirmed the GTW's motion for summary disposition finding that local governments have no authority to regulate train speed limits.

There are *no* splits of authority among courts interpreting the Federal Railroad Safety Act's preemptive status as it pertains to local train speed limits. The various United States courts of appeals,

state appellate courts and now the Michigan Supreme Court are all in unanimous agreement. There is no pressing issue or legal question presented in this petition of such import that certiorari is necessary to resolve conflicts of laws or policy.

Specific exception is taken to the petitioner's brief, Statement of Facts, page 7 through 10 which involves essentially accident information, biased interpretations of statistical summaries, and bears up relation to factual events or relevant legal issues. The rest of petitioner's statement has no facts and is merely self serving legal conclusion unsupported by any authority or logic. It is interesting only that the issue at bar concerns legislative intent of the United States Congress, not as the city seems to think, the Michigan Legislature.

Finally, GTW takes exception to the petitioner's Statement of Facts, pages 12 through 13 because it is no longer contended by Clarence Magoon, who was not a lawyer, policy-maker, regulatory specialist or involved in setting standards for railroad speed, that local governments can set train speed limits. Mr. Magoon now recognizes the area is federally preempted and states so under oath, not by hearsay affidavits proffered by the city. The rest of the factual assertion states that 45 C.F.R. 213.9, entitled "Operating Speed Limits" is not a speed limit because the city would like subcategories which the United States Department of Transportation, the FRA and regulations have treated in a different manner.

Basically, the petitioner's stated facts have little or no basis in fact at all.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT PROPERLY GRANTED RESPONDENT GRAND TRUNK WESTERN RAILROAD'S MOTION FOR SUMMARY DISPOSITION IN RULING THAT AS A MATTER OF LAW THE PETITIONER CITY OF FENTON'S LOCAL TRAIN SPEED ORDINANCE IS PREEMPTED BY THE PROVISIONS OF THE FEDERAL RAILROAD SAFETY ACT, 45 U.S.C.A. § 421, *ET SEQ.*

Generally, prior to the enactment of the Federal Railroad Safety Act in 1970, 45 U.S.C. § 421 *et seq.*, (FRSA), it was well settled that the state legislatures could empower municipal authorities to pass ordinances to regulate the speed of trains through cities. In some states, with incorporated cities and larger towns, no special legislative approval was considered necessary and such ordinances were authorized by virtue of the cities' police power as to matters within their respective jurisdictions. 20 A.L.R. 1222 Section I. *See also, Erb v. Morbasch,* 177 U.S. 584 (1900). However, regulation of the railroads is also recognized as an area of commerce power regulation historically exercised by Congress. This inherent congressional power was affirmatively exercised by the passage of a comprehensive rail safety statute.

This analysis focuses on whether the FRSA, in addition to its other safety functions, preempts regulation of train speed at the state or local level.

In determining the preemptive effect of a federal statute regulating commerce, the key question is always whether Congress intended to preempt state and local regulation, *Jones v. Rath Packing Company,* 430 U.S. 519 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *Wardair Canada v. Florida Dept. of*

Revenue, 106 S. Ct. 2369 (1986).

Our inquiry commences with the language of the Federal Railroad Safety Act of 1970, within which Congress states their goal.

> To promote safety in all areas of railroad operations and to reduce railroad related accidents, and to reduce deaths and injuries to person and to reduce damage to property caused by accidents involving any carriers by hazardous materials.

45 U.S.C. § 421.

In order to implement its objective of improved railroad safety, the Congress recognized that nationally uniform rail safety regulations were necessary. In that regard the following provision was incorporated into the FRSA legislation:

> Section 434. The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible

> with any Federal law, rule, regulation, order or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434.

Generally one gleans congressional preemptive intent by examining either implicit or explicit directive in the language and structure of the federal statute itself. An additional source of reference can be found in Congress' own reporting service, detailing in this case the legislative concerns behind enactment of the FRSA. The 1970 *U.S. Code Cong. and Admin. News,* 4109-4111, states:

> ...[T]he railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system.... To subject a carrier to enforcement before a number of state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

The preemptive intent of Congress in enacting § 434 was thoroughly discussed in *National Association of Regulatory Utility Commissioners v. Coleman,* 542 F.2d 11 (3 Cir. 1976). In this case, the National Association of Regulatory Utility Commissioners (NARUC) had challenged the right of the Federal Railroad Administration (FRA) to preempt state accident reporting requirements by issuing its own accident reporting requirements. After having reviewed the express language of 45 U.S.C. § 434 and the legislative history of the FRSA, the court concluded that "...these statutory provisions evidence, as the district court

determined, a 'total preemptive intent.'" *Id.* at 13.

Appellate courts which have examined the statute have found Congress intended to preempt state regulations, except as preserved by 45 U.S.C. § 434. *See Donelon v. New Orleans*, 474 F.2d 1108 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973), where Louisiana parish officials were found without authority under the FRSA to require a railroad to meet any safety standard beyond those contained in the national act. *See also, National Association of Regulatory Commissioners v. Coleman, supra.*

The law, cases and logic all show overwhelmingly that the federal regulatory scheme has preempted the field of railroad safety. In drafting 45 U.S.C. § 434, however, two exceptions were carved out, allowing state regulations in certain limited circumstances. The first exception is that state regulation may continue in force until such time as federal regulations covering the same subject have been adopted. The subject of the train speed has *exhaustively* regulated as a result of the FRSA. The Federal Railroad Administration established and adopted train speed regulations in conjunction with the adoption of the track and roadbed standards in 1971 (49 C.F.R., Part 213) and with the adoption and revision of signal standards previously enacted under authority of the Signal Inspection Act in 1968 (49 C.F.R., Part 236).

It is clear that the composite purpose of these regulations is to establish standards for safe train speeds based on sound engineering principles. It can also be said that while grade crossing locations are all different, the danger of car/train collisions are essentially generic, not "unique" as implied by Fenton. The requirements set forth in 49 C.F.R., Part 213, represent minimum track safety standards which "...indicate a Congressional determination to regulate the entire railroad area." *Black v. The Baltimore and Ohio Railroad Co.*, 398 N.E. 2d 3161 (Ind. C.A. 1980). In these regulations, the FRA has established safe operating speeds between

10 miles per hour and 110 miles per hour with classifications (Class 1 through Class 6) determined by the condition and/or curvature of the track and roadbed. 49 C.F.R. § 213(a); 49 C.F.R. 213.57 Appendix A. If the condition and/or curvature of the track and roadbed is such that a train cannot operate safely at a given speed, the train speed must be reduced to a point where the train can operate safely. To confirm speed limits are within the operational boundaries both railroads and federal inspectors routinely monitor and inspect track conditions. The railroad must also maintain a timetable on file with the Federal Railroad Administration (FRA) with explicit speed limits in relation to specific mileage or track territories. In the event such timetable speeds are excessive relative to the federal rules, regulations and standards, the FRA can implement by order a lower speed limit.

Fenton's brief contains a partial summary of the applicable rules and standards. It ignores that C.F.R. 213.9 is entitled "*Operating Speed Limits*". It is Fenton's position that because the Secretary of Transportation has not issued an order to the effect "Train speed in Fenton is 50 mph" that no federal "rule, regulation, standards or laws" exist. This position is fatally flawed insofar as the exhaustive engineering and speed categories contained in the Code of Federal Regulations are in direct contradiction with petitioner's assertion.

Clearly, to the extent practicable the FRSA plan controls train speeds. No regulatory system could be formulated to set track speed city by city, mile by mile through the United States and Congress never intended such a system. The suggestion that the law only concerns derailment is completely unsupported. Fenton has no support for their attempt to portray the *Operating Speed Limits* as solely related to derailments.

Their argument is directly and dispositively addressed by the case *Easterwood v. CSX Transportation Company*, 933 F.2d 1548

(11th Cir. 1991). In that case, a widow of a decedent who was killed in a crossing accident sued the railroad for negligence, alleging, among other things, that the train speed was excessive, although it was within federally established limit. The appeals court upheld the trial court's summary disposal of that claim and further ruled that the FRSA speed limits are by no means limited to derailment concerns and that it is not relevant to the existence of preemption. On speed limits, the court said,

> We note that the question of train speed has been addressed by Congress through the Secretary of Transportation. The Secretary has established regulations governing the maximum speed for passenger and freight trains on various classes of track. See 49 C.F.R. 213.9 (1990). *We therefore find this claim to be preempted since Congress has stated that as soon as the Secretary has established a safety regulation all state regulations governing the same area are preempted.*

Id. at 1553.

They continued on the issue of speed laws being limited to non-grade crossing standards,

> Easterwood first argues that preemption is inappropriate because the speed limits were not adopted in order to minimize the number of grade crossing accidents. Easterwood notes that the various speed limits found in 49 C.F.R. 213.9 (1990) are related to the class of track and the curve of the track . . . that sections of track are classified on the basis of several factors including the track ballast . . . the

> number of quality of the cross ties . . . etc. Easterwood points to these factors and notes that the speed limits are not related to the density of the surrounding population. Easterwood, therefore, concludes that the Secretary adopted the speed limits to prevent derailments and not to prevent grade crossing accidents. However, the Supreme Court held in Florida Lime & Avocado Growers, Inc. v Paul, 373 U.S. 132, 142, 83 S. Ct. 1210, 1217, 10 L. Ed. 248 (1963), that it is irrelevant to preemption analysis whether the state law's objectives are similar to or different from the federal law's objectives. Preemption analysis turns on Congress' intent to preempt state law and on the nature of the federal regulations. Moreover, Easterwood does not point to any legislative history for the speed limits and therefore she asks us to guess at the motives behind the Secretary of the Treasury. Such guessing is inherently suspect. While Easterwood assumes that the speed limits are designed to prevent derailments, it is equally valid to assume that the speed limits were set low enough that, in conjunction with adequate grade crossing signals and gates, the speed limits were intended to lessen the number of grade crossing accidents as well as lessen the chances of derailments.

Id. at 1553 and 1554.

Fenton's position that population density is a dispositive element on supporting local train speed ordinances as unique local safety "hazards" and "track standards in isolation" is without substance.

The United States Supreme Court let stand an appellate court decision which had ruled that the FRSA preempted a Texas statute requiring cabooses on all trains. Cabooses are never even addressed in the FRSA but still the state law fell. *See Missouri Pacific Railroad v. Railroad Commission of Texas,* 850 F.2d 264 (5th Cir. 1988), *cert. denied,* 109 S. Ct. 794 (1988). The case shows that even state laws must give way to the FRSA when in conflict and not within the statutory exceptions. This Court also refused review of *CSX Transportation Inc. v. Public Utilities Commission of Ohio,* 901 F.2d 497 (6th Cir. 1990), *cert. denied,* 111 S. Ct. 781 (1991). In that case the Court found that state hazardous materials transportation laws were in conflict with the FRSA regulations and, therefore, were preempted.

As to the FRSA's effect on existing ordinances, it is well established that an ordinance which is preempted by federal legislation or regulation is unconstitutional by virtue of the Supremacy Clause of the United States Constitution (Art. VI, cl. 2). Giving all presumptions in favor of the city-non-movant pursuant to rules regarding motions for summary disposition, the court made the only decision the law allowed him to make.

Fenton's repeated and unfounded reliance on the archaic decision in *Erb v. Morasch, supra,* is patently erroneous and displays an unfamiliarity with the nature of constitutional law. It is a proposition unassailable that the Congress can legislate or regulate a subject subsequent to a Supreme Court decision on the same subject. The petitioner's theory that the court's recognition in 1900 of local speed ordinances precludes subsequent congressional legislative action is both novel and wrong. *Erb* itself limits its ruling by the phrase, *"until at least Congress shall take action in the matter." Supra* at 588. Well, Congress has by passing the FRSA. Time hasn't stopped, even in Fenton, and the horse and buggy days with their parochial economics is long gone.

It is clear from the engineering detail, categorization of track conditions, and explicit speed restrictions that the specific subject of train speed is now covered by "rule, regulation, order or standards" promulgated by the federal government. This specifically excludes conflicting state or local regulations that may have been enacted and that don't fit into another section of the 45 U.S.C. § 434 exceptions.

The provisions of the FRSA are clear and unambiguous. The use of the term "state" is not obscure, vague or capable of raising a serious question of definition. Fenton contends they have been cloaked with the state's authority by virtue of their interpretation of certain Home Rule Cities Act provisions, specifically M.C.L.A. 117.4(h); M.S.A. 5.2081.4(h) which substance allows cities to control public streets.

The second exception under § 434 provides that more stringent state regulations may continue to force even when federal regulations covering the same subject have been adopted, provided three criteria have been met:

> 1. the regulation is necessary to eliminate or reduce an essentially local safety hazard;
>
> 2. the regulation is not incompatible with any federal regulation; and
>
> 3. the regulation does not create an undue burden on interstate commerce.

See Donelon v. New Orleans Terminal Company, supra.

Only in rare instances, arising from unique local situations, can a state regulate train speeds.

That the term "State" utilized in the local safety hazard exception of § 434 does not include municipalities is clear from the legislative history of the FRSA. That history reflects that Congress fully considered and knowingly rejected the idea of allowing municipalities, in addition to states, to regulate local safety hazards. Specifically, Congress refused to permit the type of state/municipal regulation contained in the Natural Gas Pipeline Safety Act which permits both a state agency *and* a municipality to continue regulating intrastate pipeline transportation safety either through certification or by agreement with the Secretary of Transportation. 49 U.S.C. §1674(a)(b). Violations of these state/municipal regulations are violations of the Natural Gas Pipeline Safety Act, provided the state/municipal regulations are not more stringent than the federal regulations, 49 U.S.C. § 1686(f). In examining and rejecting this system of state and municipal participation in regulating rail safety, Congress declared that:

> The characteristics of the distribution of gas through pipelines . . . is quite different from that of transportation of goods and materials by railroads . . . With the exception of industrial plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system. . . . *To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.* Consequently, it is the judgment of the committee that the nature of railroad operations requires a different system of regulation and enforcement from that which was effected for natural gas pipeline safety.

1970 *U.S. Code Cong. & Admin. News*, 4108.

It is the inescapable conclusion from this language that Congress *considered and rejected* joint state/municipal authority to legislate train safety laws and that the explicit grant of regulatory authority was restricted to and vested solely in states. Plain language must be taken at face value and accorded its normal and common definitions. Our Congress is not so devoid of semantic knowledge that they confuse "state" with "municipal", or use the two interchangeably.

The purpose of the FRSA is to promote rail safety and reduce rail accidents. 45 U.S.C. § 421. Since Congress determined that ". . . safety in the nation's railroads would not be advanced by subjecting the national rail system to a variety of enforcement and conflicting requirements in 50 different jurisdictions . . .", Congress enacted § 434 of the Act. *National Association of Regulatory Utility Commissions, supra*, 452 F.2d 11, at 13-14; 1970 *U.S. Code Cong. & Admin. News*, 4109. Clearly, the purpose of § 434 is to eliminate, not encourage, a multitude of nonuniform rail safety standards.

No court that has reviewed the question of local government or municipal authority to regulate train speed or any other aspect of train safety has found the word "state" broad enough to imply delegatory powers to cities. The most recent findings on this point is in the case of *CSX v. City of Thorsby, Alabama*, 741 F. Supp. 889 (M.D. Ala. 1990). They quickly cut through the argument by a city that they are standing in the shoes of the state in enacting a 25 mph train speed ordinance. The court states,

> Thorsby argues that it enacted its train speed regulation on behalf of the state. Thorsby's argument does not wash. The ordinance being challenged here was passed by the City of

> Thorsby and not by the State of Alabama. It is thus a city ordinance and not a state law or regulations which is at issue. The fact that the city may have acted or delegated authority does not detract from this dispositive fact.

Id. at 891. *All* courts examining the issue have ruled the same way.

It must be pointed out quite clearly that Fenton has shown *no* authority for their position. Not one case. They have a bureaucrat's now recanted affidavit and a legislative highlight to a bill that didn't pass as drafted, regarding a law the state couldn't enforce if it did pass. Michigan did act and it is exactly opposite the Fenton position.

In Michigan, however, municipalities no longer have even the pretense of statutory authority to regulate freight train speed. The statute which cities used to rely on in regulating train speed was M.C.L.A. 91.6, M.S.A. 5.1745 which, in pertinent part, read as follows:

> The council shall have the power to . . . require and compel railroad companies to keep flagman or watchman at all railroad crossings of streets, and to give warning of the approach and passage of trains thereat, and to light such crossings during the night; to regulate and prescribe the speed of all locomotives and railroad trains and street railway cars within the city; but such speed shall not be required to be less than six (6) miles per hour; and to impose a fine of not less than five (5) nor more than fifty (50) dollars, upon the company, and upon any engineer or conductor, violating any ordinance regulating the speed of trains.

This statute was revised in 1984 and bears significant differences from the previous statute. It now reads as follows:

> Section 5.1745. Railroad crossing grades; flagmen; speed of train. Section 6. The council [may] provide for and change the location and grade of street crossings of any rail track; compel any railroad company or street railway company to raise or lower [its] railroad track to conform to street grades which may be established by the city; construct street crossings in [a] manner and with [the] protection to persons crossing [at those crossings] as the council may require and to keep [those crossings] in repair [and] require and compel railroad companies to keep flagmen or watchmen at all railroad crossings of streets and to give warning of the approach and passage of trains [at those crossings] and to light [those] crossings during the night. [On and after the effective date of a passenger railroad maximum speed limit specified in a final order of the director of the state transportation department, an ordinance of a city prescribing the maximum speed limit of locomotives used in passenger train operations or of passenger railroad trains shall not be enforceable as to a speed limit other than the limit set forth in the order.]

The thrust of the new version with regard to train speed, eliminates any reference to city authority to regulate train speed, whether freight or passenger trains. All reference to freight trains has been deleted. This is no mere oversight. It reflects the measured judgment of the legislature, which eliminated the previous

statutory language " . . . to regulate and prescribe the speed of all locomotives and railroad trains . . ." If the legislature intended to vest authority in municipalities to control freight train speed, they would have mirrored the all inclusive language of the predecessor statute. The new version of the statute also vests the sole authority to issue orders regulating passenger train speed to the Michigan Department of Transportation. In effect, the new statute reserves authority solely to the state. This conforms to the dictates of 45 U.S.C. § 434, which also restricts regulation of local safety hazards solely to the state.

The precise issue of whether a municipality could continue regulating under the "local safety hazard" exception to § 434 of the FRSA was addressed in *Donelon v. New Orleans Terminal Co., supra.* This case held that Jefferson Parish, Louisiana officials could not regulate track standards of the New Orleans Terminal Company since such standards are regulated by the FRA in 49 C.F.R., Part 213, which also regulates train speed. The court stated: "the Railroad Safety Act, however, speaks of an exception for 'States' " *Id.* at 1112. "[T]hese individual officials [of Jefferson Parish] are without authority under the Federal Railroad Safety Act of 1970 to require the Railroad to meet any safety standard beyond those provided for in the national Act." *Id.* at 113.

Fenton has proffered this argument: That the Home Rule Cities Act empowers the city to control it streets, that the Michigan Constitution enshrines these powers as inviolable, and the the FRSA is therefore preempting, not a single local speed ordinance but the whole state constitution and the Home Rule Cities Act. This is an amazing position.

All cities are creatures of the states. They cannot be granted more power than a state has. In preempting the field the federal government simply does not allow state delegation of this power to a municipality so the state cannot give what they do not have.

Fenton repeatedly emphasizes the case *Wisconsin Public Intervenor v. Mortier*, 501 U.S. __, 111 S. Ct. 2476, 115 L. Ed. 2d 46 (1991) as authority that the use of the word "state" in federal legislation automatically implies "local governments" can be substituted for "state". The Michigan Supreme Court adequately distinguishes the cases, however, in short these basic differences exist. First, the FRSA states unambiguously in 45 U.S.C.A. § 421 that it is taking over the whole field of railroad safety wherever practicable and with no mention of a state/local concurrent power structure. The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) 7 U.S.C.A. § 136 *et seq.* has no such all inclusive statement of purpose and does in its body refer to some local input or contacts.

More telling, however, is *Mortier* involved no direct federal law conflicting with the local law. Our case does! Train speeds are a matter of explicit federal law at 49 C.F.R. 213.9. This is critical and determinative. Fenton's speed law cannot co-exist with the specific federal speed law, *Mortier* simply doesn't apply.

In addressing the final requirement of the "local safety hazard" exception in 45 U.S.C. § 434, any state speed regulation must not create "an undue burden on interstate commerce". The classic formulation of the Commerce Clause test is set forth in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). *Southern Pacific* requires courts to balance the benefit to local safety which the challenged ordinance provides against the burden upon interstate commerce which it imposes. Generally speaking, the means used to ensure local safety must be appropriate to the ends sought and also must have the least impact on interstate commerce as is necessary to correct legitimate local safety problems.

It requires little imagination to assess the resulting burden on interstate commerce of a multitude of arbitrary, differing and changing speed rules imposed on train speeds by local governments. Trains take miles to adjust speeds up or down. The

effect of a local speed, whether published by the railroad or statute, requires a train crew to slow a train long before it would enter a specific city. In Wayne County, Michigan, a train conceivably can pass through ten cities in one half hour and be subject to ten different speed limits. Effectively trains would all slow to under 25 mph. This is the exact problem Congress intended to correct.

CONCLUSION

The trial court properly granted summary disposition and in enjoining Fenton's ordinance. The Michigan Court of Appeals properly affirmed that ruling as did the Michigan Supreme Court by unanimous vote.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — RULE 29.1 LIST OF SUBSIDIARY COMPANIES

RULE 29.1 LIST OF SUBSIDIARY COMPANIES

The following is a list of domestic companies in which Grand Trunk Western Railroad Company owns a whole significant or controlling interest:

Domestic Three Leasing Corporation

Domestic Four Leasing Corporation

APPENDIX B — RULE 29.1 LIST OF PARENT COMPANIES AND THEIR SUBSIDIARIES

RULE 29.1 LIST OF PARENT COMPANIES AND THEIR SUBSIDIARIES

The Grand Trunk Western Railroad Company is a wholly owned subsidiary of the Grand Trunk Corporation, which, in turn is wholly owned by the Canadian National Railroad.

The following is a list of domestic and foreign companies in which the Grand Trunk Corporation or the Canadian National Railroad owns a whole, significant or controlling interest:

CONSOLIDATED COMPANIES

Autoport Limited

Canac International Inc.

Canac International Ltd.

The Canada and Gulf Terminal Railway Company

Canadian National Express Company

Canadian National Railway Company

The Canadian National Railways Securities Trust

Canadian National Steamship Company, Limited

Canadian National Telegraph Company

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Canadian National Transfer Company Limited

Canadian National Transportation, Limited

The Canadian Northern Quebec Railway Company

Canat Limited

Canaven Limited

Central Vermont Railway, Inc.

Chapman Transport Limited

CN Exploration Inc.

C.N. (France) S.A.

CNM Inc.

CN Tower

CN Transactions Inc.

Duluth, Winnipeg and Pacific Railway Company

E.I.D. Electronic Identification Systems Ltd.

Empire Freightways Limited

Grand Trunk Corporation

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Grand Trunk Land Development Corporation

Grand Trunk Technologies, Inc.

Grand Trunk Western Railroad Company

The Great North Western Telegraph Company of Canada

The Minnesota and Manitoba Railroad Company

The Minnesota and Ontario Bridge Company

Mount Royal Tunnel and Terminal Company, Limited

The Northern Consolidated Holding Company Limited

173335 Canada Inc.

The Quebec and Lake St. John Railway Company

Royal Transportation Limited

JOINTLY-OPERATED AND OTHER COMPANIES IN WHICH THE SYSTEM HAS INVESTMENTS

The Belt Railway Company of Chicago

The Canada Southern Railway Company

Canaprev Inc.

Compagnie de gestion de Matane Inc.

Appendix B

Corporation de Chauffage Urbain de Montreal

Detroit River Tunnel Company

Dome Consortium Investments Inc.

Domestic Two Leasing Corporation

Eurocanadian Shipholdings Limited

Fort Point Holdings Ltd.

Halterm Limited

Innotermodal Inc.

Lakespan Marine Inc.

Portage & Main Development Ltd.

Railroad Association Insurance, Ltd.

Seabase Limited

Shawinigan Terminal Railway Company

Societe du port ferroviaire de Baie Comeau-Hauterive

Telesat Canada

The Toronto Terminals Railway Company Limited

Appendix B

TTX Company

In addition, the property of the Canadian Government Railways is entrusted to the Canadian National Railway Company as part of the System.